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PP

v.

MOHD BANDAR SHAH NORDIN & ANOR

B

COURT OF APPEAL, PUTRAJAYA
GOPAL SRI RAM JCA
AHMAD MAAROP JCA
SULAIMAN DAUD JCA
[CRIMINAL APPEAL NO: A-05-50-2005]

C

14 MAY 2008

CRIMINAL LAW: *Dangerous Drugs Act 1952 - Section 39B(1)(a) - Trafficking in cannabis - Acquittal - Whether justified - Circumstantial evidence - Whether no proper evaluation of circumstantial evidence -*

D *Prosecution relying on presumption of possession - No finding of fact made whether accused found in possession of drugs - Whether a misdirection - Dangerous Drugs Act 1952, ss. 37(da), 39B(1)(a) - Penal Code, s. 34*

EVIDENCE: *Circumstantial evidence - Trafficking in dangerous drugs*

E *- Securing conviction on circumstantial evidence - Governing principles - Individual strand of circumstance insufficient by itself to prove the charge - Whether inconsequential - Whether to consider combined effect of several strands of circumstantial evidence*

EVIDENCE: *Credibility - Impeachment - Impeachment of witness'*

F *credit - Discrepancies between police report and oral testimony in court - Whether discrepancies only mere omissions - Whether witness worthy of credit - Whether trial judge misdirected himself - Proper approach - Evidence Act 1950, s. 155(c)*

G The learned trial judge in this case had acquitted and discharged the respondents of an offence under s. 39B(1)(a) of the Dangerous Drugs Act 1952 ('the Act') read together with s. 34 of the Penal Code without calling for their defence. The acquittal was predicated upon the learned judge's findings that: (i) the

H evidence of PW3, the police officer who lodged the police report ('exh. D20') against the respondents, stood impeached as there were discrepancies between his oral testimony and exh. D20; (ii) PW3's evidence was wanting in credibility; and (iii) none of the individual items of circumstantial evidence adduced could

I incriminate the respondents, or showed any prearranged plan

between the respondents. Aggrieved, the Public Prosecutor appealed and argued that the learned judge was wrong in impeaching the creditworthiness of PW3, as the discrepancies were nothing more than mere omissions. The witness, according to the prosecution, had only said more in his evidence than that stated in his police report. It was further argued that the circumstantial evidence adduced – namely the recovery of the cannabis from the carrier of the motorcycle owned by the first respondent or his brother, the respondents' close proximity to the proscribed drug, the fact that the first respondent was seated on the motorcycle when first seen by PW3 and PW5, and the respondents' flight when confronted by the police – were more than sufficient to warrant the court to call for the defence. In consequence, issues arose before the learned justices of appeal as to whether the decision to impeach PW3 pursuant to s. 155(c) of the Evidence Act 1950 herein was sustainable, and secondly, whether the learned judge had misdirected himself when considering the circumstantial evidence adduced before him.

Held (allowing the appeal):
Per Gopal Sri Ram JCA delivering the judgment of the court

(1) Having read and reread both PW3's evidence at the trial and exh. D20, we are satisfied that objectively speaking he was a witness worthy of credit. The discrepancies are in truth nothing more than mere omissions. As was said in *Muthusamy v. PP* 'a mere omission is hardly ever a discrepancy. The police statement is usually much briefer than the evidence'. Accordingly, the learned judge misdirected himself in a material particular when impeaching the credit of this witness. (paras 3-5)

(2) In approaching issues of credibility, a trier of fact must always bear in mind the tests applicable when evaluating oral evidence, including motive and probabilities of the case. On the facts, the learned judge had quite rightly found no evil motive on the part of PW3. His sole ground for rejecting the evidence of this witness as wanting in credibility was the contradictions between his evidence and the contents of exh. D20. Unfortunately, the learned judge did not direct his mind to this critical question: was the evidence of PW3 so improbable that it warranted to be given no weight whatsoever? This was a serious misdirection on the part of the learned judge. (paras 6 & 7)

(3) The facts showed that to establish the case of trafficking, the prosecution was relying on the presumption under s. 37(da) of the Act. That being so, to determine whether that presumption applied, it was essential for the learned judge to find as a fact whether the respondents or either of them were found in possession of the cannabis. This exercise was not undertaken by the learned judge. (para 10)

(4) The learned judge had misdirected himself when considering the circumstantial evidence before him. It may well be true that each of the circumstances is insufficient by itself to bring home the charge against the respondents. But the governing principle is quite different. It is the combined effect of the several strands of circumstantial evidence that must be considered by the trial court (*Chan Chwen Kong v. PP*). The learned judge, however, did not apply this test and there was hence no proper evaluation by him of the circumstantial evidence led by the prosecution. In any case, upon the combined strength of the individual strands of the circumstances, a reasonable tribunal properly directing itself on the law and the facts would have come to the conclusion that the totality of the evidence reasonably supported an irresistible *prima facie* inference that the respondents were found in possession of the proscribed drug. In short, they had *mens rea* possession of the drugs. Consequently, the learned judge ought to have called upon the respondents to make their defence to the charge framed against them. (paras 8, 9 & 10)

(5) The items of evidence that the judge took into account as negativing common intention overlooked two critical pieces of evidence which linked the second respondent to the crime, namely his close proximity to the drug and his conduct in fleeing when the police identified themselves. Further, it is settled law that a prearranged plan is not synonymous with a premeditated crime, for a prearranged plan may be formed simultaneously. (paras 12 & 13)

Bahasa Malaysia *Translation Of Headnotes*

Yang arif hakim bicara dalam kes ini telah membebas dan melepaskan responden-responden atas kesalahan di bawah s. 39B(1)(a) Akta Dadah Berbahaya 1952 ('Akta') di baca bersama s. 34 Kanun Keseksaan tanpa memanggil mereka untuk membela diri. Pembebasan adalah berasaskan dapatan yang arif hakim bahawa: (i) keterangan PW3, pegawai polis yang membuat laporan polis (eks. D20') terhadap responden-responden, menjadi tercabar disebabkan perselisihan yang terdapat di antara keterangan lisannya di mahkamah dan eks. D20; (ii) keterangan PW3 tidak boleh dipercayai; dan (iii) tiada satu pun dari utas keterangan ikut keadaan yang dikemukakan mampu menjadikan responden-responden bersalah, atau menunjukkan pakatan terancang oleh mereka. Terkilan, Pendakwa Raya merayu dan berhujah bahawa yang arif hakim khilaf dalam menolak keterangan PW3, kerana perselisihan yang wujud hanyalah semata-mata peninggalan, tidak lebih dari itu. Saksi, menurut pendakwaan, hanya memberitahu lebih banyak dari apa yang dikatakan di dalam laporan polisnya. Dihujahkan selanjutnya bahawa keterangan ikut keadaan yang dikemukakan – yakni penemuan kanabis dari dalam raga motosikal kepunyaan responden pertama atau abangnya, kehampiran responden-responden kepada dadah terlarang tersebut, fakta bahawa responden pertama sedang duduk di atas motosikal ketika pertama kali dilihat oleh PW3 dan PW5 serta tindakan responden-responden melarikan diri apabila bersemuka dengan polis – adalah lebih dari mencukupi untuk yang arif hakim memanggil responden-responden untuk membela diri. Berikutnya, isu-isu berbangkit di hadapan yang arif hakim-hakim rayuan berhubung sama ada keputusan untuk mencabar keterangan PW3 di bawah s. 155(c) Akta Keterangan 1950 di sini boleh dipertahankan, dan kedua, sama ada yang arif hakim telah tersalah arah akan dirinya apabila menimbang keterangan ikut keadaan yang ada di hadapannya.

Diputuskan (membenarkan rayuan):
Oleh Gopal Sri Ram HMR menyampaikan penghakiman mahkamah

(1) Setelah berkali-kali membaca keterangan PW3 di mahkamah dan eks. D20, kami berpuashati bahawa PW3 secara objektifnya adalah seorang saksi yang boleh dipercayai. Perselisihan di sini sebenarnya tidak lebih dari satu peninggalan. Sepertimana yang dikatakan di dalam *Muthusamy*

v. PP 'peninggalan tidak akan menjadi satu perselisihan. Laporan polis biasanya lebih ringkas dari keterangan'. Ianya mengikut bahawa yang arif hakim telah tersalah arah akan dirinya bilamana mencabar kebolehpercayaan saksi ini.

(2) Dalam menangani isu kredibiliti, seorang pengadil fakta harus mengingatkan dirinya mengenai ujian-ujian terpakai, termasuk motif dan kebarangkalian kes. Di atas fakta, yang arif hakim dengan betulnya tidak menemui sebarang motif jahat di pihak PW3. Alasan tunggalnya dalam menolak keterangan saksi ini adalah kerana terdapat perselisihan di antara keterangannya dengan eks. D20. Malangnya, yang arif hakim tidak mengarahkan pertimbangannya kepada soalan penting ini, iaitu: adakah keterangan PW3 sebegitu mustahil sehingga langsung tidak boleh diberi pertimbangan? Ini satu salah arahan serius di pihak yang arif hakim.

(3) Fakta menunjukkan bahawa untuk membuktikan kes pengedaran, pendakwaan bergantung kepada anggapan di bawah s. 37(da) Akta. Oleh yang demikian, untuk menentukan sama ada anggapan tersebut terpakai, yang arif hakim perlu membuat dapatan sama ada responden-responden atau salah seorang dari mereka didapati mempunyai milikan kanabis. Ini tidak dilakukan oleh yang arif hakim.

(4) Yang arif hakim telah tersalah arah akan dirinya dalam menimbang keterangan ikut keadaan di hadapannya. Mungkin benar bahawa setiap satu utas keterangan ikut keadaan tersebut secara tersendiri tidak mencukupi untuk membuktikan kesalahan yang dipertuduhkan. Tetapi prinsip yang terpakai adalah berlainan. Yang perlu dipertimbang oleh mahkamah bicara adalah kesan keseluruhan kesemua utas-utas keterangan ikut keadaan tersebut (*Chan Chwen Kong v. PP*). Yang arif hakim bagaimanapun tidak menggunapakai ujian ini, dan dengan itu, tiada penilaian wajar dibuat terhadap keterangan ikut keadaan yang dikemukakan oleh pendakwaan. Walau apapun, berdasarkan kekuatan keseluruhan utas-utas halkeadaan yang ada, sebuah tribunal yang munasabah, berbekalkan arahan-arahan yang betul mengenai undang-undang dan fakta, akan mencapai keputusan bahawa keterangan pada keseluruhannya menyokong pencapaian inferens *prima facie* tidak boleh tidak bahawa responden-

responden mempunyai milikan dadah terlarang tersebut. Pendeknya, mereka mempunyai *mens rea* milikan dadah berkenaan. Oleh itu, yang arif hakim sewajarnya memanggil kedua-dua responden untuk membela diri atas pertuduhan yang dihadapkan ke atas mereka.

(5) Melihat kepada butiran-butiran keterangan yang diambilkira oleh yang arif hakim dalam menolak niat bersama, beliau telah terlepas pandang dua keratan keterangan yang mengaitkan responden kedua kepada jenayah, iaitu kehampirannya kepada dadah dan kelakuannya melarikan diri apabila polis memperkenalkan diri mereka. Selain itu, sudah menjadi undang-undang mantap bahawa satu pakatan terancang tidak sama dengan satu jenayah terancang, kerana pakatan terancang boleh wujud pada waktu itu juga.

Case(s) referred to:
Abdullah Zawawi Yusoff v. PP [1993] 4 CLJ 1 SC ***(dist)***
Chan Chwen Kong v. PP [1962] 28 MLJ 307 ***(refd)***
Dasu v. State [1985] CRI LJ 1933 ***(foll)***
Mahbub Shah v. Emperor AIR [1945] PC 118 ***(refd)***
Muthusamy v. PP [1948] MLJ 57 ***(foll)***
Pandurang v. State of Hyderabad AIR [1955] SC 216 ***(refd)***
PP v. Dato' Harun Hj Idris [1977] 1 MLJ 14 ***(refd)***
PP v. Foo Jua Eng [1966] 1 MLJ 197 ***(refd)***
PP v. Mohamed Ali [1962] MLJ 257 ***(refd)***
Tengku Mahmood v. PP [1974] 1 MLJ 110 ***(refd)***

Legislation referred to:
Dangerous Drugs Act 1952, s. 39B(1)(a)
Evidence Act 1950, s. 155(c)
Penal Code, s. 34

For the appellant - Mangaiarkarasi Krishnan; DPP
For the 1st respondent - Gurbachan Singh Bagawan Singh (Sakthivel Nagalingam with him); M/s Jagjit, Kerpal & Sakthi
For the 2nd respondent - Gurbachan Singh Bagawan Singh; M/s Bachan & Kartar

[Appeal from High Court, Ipoh; Criminal Trial No: 45-36-2002]

Reported by Wan Sharif Wan Ahmad

A

JUDGMENT

Gopal Sri Ram JCA:

[1] This is the judgment of the court.

B **[2]** This is an appeal by the Public Prosecutor against the decision of the High Court in Ipoh acquitting and discharging the respondents on the charge framed under s. 39B(1)(a) of the Dangerous Drugs Act 1952 ("the Act") read with s. 34 of the Penal Code without calling upon their defence. The facts relevant C to this appeal may be shortly stated. On 24 January 2002 at about 10pm PW3, PW4 and PW5, all police officers were on their rounds. At about that time they came to the Tapah rest area. Their evidence is that they saw the respondents acting suspiciously. According to PW3 and PW5 the first respondent was D seated on a motorcycle number AEF 2360. The second respondent was standing next to the motorcycle. The police, suspecting that something was afoot, approached the two respondents and identified themselves as police officers. Thereupon the respondents took flight. They ran in different directions. They E were eventually apprehended. While his fellow policemen were pursuing the respondents PW5 stood guard over the motorcycle. He noticed a black sling bag (exh. P12) in the motorcycle's carrier. After their arrest the respondents were taken to the police station where PW3 lodged a police report (exh. D20). The F contents of exh. P12 were sent to the chemist who after a chemical analysis found it to be 976 grams of cannabis. The respondents were then charged with the offence of trafficking.

[3] The learned trial judge acquitted the respondents on two G main grounds. First, he found PW3 to be a witness unworthy of credit and therefore had his evidence impeached. Besides this he also held PW3's evidence to be wanting in credibility. Second, he held that there were insufficient circumstances to establish that the respondents had trafficked in the proscribed drug in question. H Taking the first point, the learned judge's decision on the evidence of PW3 turned on what he considered to be material contradictions between the evidence of that witness in court and what he had stated in exh. D20. In fairness to the learned judge it must be said that he listed the contradictions that warranted a

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finding that PW3 was a witness unworthy of credit under s. 155(c) of the Evidence Act. The learned deputy who has argued this appeal has submitted that the discrepancies upon which the learned judge relied are in truth nothing more than mere omissions. In ably putting the case for the appellant before us, she submitted that a witness' credit should not be impeached for mere omissions save in exceptional cases. It is the Public Prosecutor's contention that PW3 had merely stated more in his evidence than what he had set out in his police report exh. D20. In other words the omissions in D20 ought not to have been relied upon by the learned judge in arriving at the conclusion that PW3 was a witness unworthy of credit. With these arguments we are entirely in agreement.

[4] In *Muthusamy v. Public Prosecutor* [1948] MLJ 57, the *locus classicus* on the subject under discussion, Taylor J had this to say:

> A mere omission is hardly ever a discrepancy. The police statement is usually much briefer than the evidence.

Again in *Dasu v. State* [1985] CRI LJ 1933, 1938 the court held as follows:

> In order to see whether there is a contradiction by omission it is necessary to find out whether the two statements cannot stand together. It is also necessary to see whether the statement which the witness has made in the witness-box should have been made by him while reporting the matter soon after the incident. If the two statements made by the witness cannot stand together and the statement in the Court is such that the witness would necessarily have made at the time of his earlier statement, then a lone omission thereof can be considered to be a contradiction.

[5] Applying the test in *Dasu*, we are unable to say with any conviction that the statements made by PW3 on oath would necessarily had been made by him in exh. D20. Having read and reread both PW3's evidence at the trial and his police report exh. D20, we are satisfied that objectively speaking he was a witness worthy of credit. Accordingly, in our judgment, the learned trial judge misdirected himself in a material particular by impeaching the credit of this witness. We would therefore restore PW3 as a witness worthy of credit. No taint should accordingly attach to him.

[6] We now turn to the argument directed at the credibility of PW3. Learned counsel for the respondents in a very carefully formulated and formidable argument has submitted that whatever may be the learned judge's finding on PW3's credit this court should in accordance with settled principle not interfere with the trial judge's conclusion that the witness was not credible. In approaching issues of credibility it is always necessary to bear in mind the tests that a trier of fact should ordinarily apply when evaluating oral evidence. One of the tests is motive. The presence or absence of motive on the part of a witness is a relevant consideration which a trial court should take into account. See, *Tengku Mahmood v. Public Prosecutor* [1974] 1 MLJ 110. Another relevant consideration are probabilities of the case. If a witness' evidence is improbable, this would be a good reason for rejecting his evidence or according it very little weight. By the same token, where the evidence of a witness accords with the probabilities of the case, it would be a serious misdirection on the part of the trial court to give it little or no weight on grounds of credibility. When there is a conflict of evidence in or between the testimony of witnesses, it is the duty of the trier of fact to warn himself of the danger of acting upon the evidence of a given witness. Contradictions within and between the evidence of witnesses there are always bound to be. But that is not a good reason by itself to hold the evidence of a witness to be lacking in credibility. See, *Public Prosecutor v. Dato' Harun bin Haji Idris* [1977] 1 MLJ 14. In respect of the assessment of evidence of police officers we can do no better than to quote from the judgment of Thomson CJ in *Public Prosecutor v. Mohamed Ali* [1962] MLJ 257:

> When a police witness says something that is not inherently improbable his evidence must in the first instance be accepted. If his evidence is contradicted by other evidence or is shaken by cross examination then it becomes the business of the Magistrate to decide whether or not it should be accepted. In the absence of contradiction, however, and in the absence of any element of inherent probability the evidence of any witness, whether a police witness or not, who gives evidence on affirmation, should normally be accepted.

[7] In the present case, the learned judge quite rightly found no evil motive on the part of PW3. His sole ground for rejecting the evidence of this witness as wanting in credibility were the contradictions in or conflict between his evidence and the

contents of exh. D20. Unfortunately the learned judge did not direct his mind to the critical question: was the evidence of PW3 so improbable that it warranted to be given no weight whatsoever? This in our respectful view constitutes a serious misdirection on the part of the learned judge. Additionally, except for a very cursory reference to PW4 and PW5 there is nothing in his grounds of judgment to show that he considered and evaluated the evidence of these witnesses.

[8] The learned deputy public prosecutor has argued that the learned judge misdirected himself when considering the circumstantial evidence that was adduced before him. We think there is merit in this complaint. It is patent from the learned judge's evaluation of the individual items of circumstantial evidence that he found no single item of these to incriminate the respondents. Among the circumstances relied upon the prosecution are the following. First, the close proximity of both respondents to the proscribed drug. The public prosecutor says that this points to knowledge of the nature of the drug. Here it is important to recall to mind the decision in *Public Prosecutor v. Foo Jua Eng* [1966] 1 MLJ 197 where it was held that close physical proximity to an offending exhibit is a circumstance which must be taken into account in determining the mental element, such as knowledge, of a particular offence. That case concerned an accused who was charged with the offence of assisting in carrying on a public lottery. The evidence showed that the accused was found by the police in a room sitting about three feet away from a dressing table on which the offending exhibits were found. The magistrate acquitted the accused on the ground that possession of the exhibit had not been proved. An appeal by the public prosecutor was allowed. There was, of course, an additional element in that case. The accused there had attempted to close the door on the police officers who sought entry into the room. But there are also additional circumstances in the present instance. And that brings us to the next item of circumstantial evidence. The second fact relied upon by the prosecution is the flight of the respondents when the police identified themselves. Learned counsel for the respondents has argued that mere flight or absconding is insufficient. There are a number of cases including *Abdullah Zawawi bin Yusoff v. Public Prosecutor* [1993] 4 CLJ 1 where it has been held that evidence of mere flight is insufficient to establish guilt.

But if you look carefully enough at all these cases, in each of them flight by the accused was the only circumstance relied upon by the prosecution to bring home the charge. In the present appeal flight is not the only circumstance relied upon. The third item of circumstantial evidence is the motorcycle itself. It was established at the trial that this vehicle belonged to the first respondent's brother (PW6) who, a few months after his father's demise on 11 June 2001 had given it away to the first respondent. The fourth circumstance is the fact that the first respondent was seated on the motorcycle when first seen by PW3 and PW5. The fifth and final circumstance is the fact of recovery of the cannabis from the carrier of the motorcycle.

[9] It may well be true that each of the foregoing circumstances when taken by itself is insufficient to bring home the charge against the respondents. But the governing principle is quite different. It is the combined effect of several strands of circumstantial evidence that must be considered by a trial court. As stated by Thomson CJ in *Chan Chwen Kong v. Public Prosecutor* [1962] 28 MLJ 307:

> In the first place we have listened to a careful, accurate and detailed analysis of the evidence against the appellant. That evidence was entirely circumstantial and what the criticism of it amounts to is this, that no single piece of that evidence is strong enough to sustain the convictions. That is very true. It must, however be borne in mind that in cases like this where the evidence is wholly circumstantial what has to be considered is not only the strength of each individual strand of evidence but also the combined strength of these strands when twisted together to make a rope. The real question is: is that rope strong enough to hang the prisoner?

[10] A careful reading of the judgment under appeal reveals that the learned trial judge did not apply the test laid down in *Chan Chwen Kong*. This in our judgment constitutes a serious misdirection. With great respect, we are of the view that there was no proper evaluation by the learned judge of the circumstantial evidence led by the prosecution. It must be borne in mind that to establish its case of trafficking against the respondents the prosecution was relying on the presumption under s. 37(da) of the Act. In order to determine whether that presumption applied it was essential for the learned judge to find

as a fact whether the respondents or either of them were found in possession of the cannabis in question. This exercise was not carried out by the learned judge. However, based on the combined strength of the individual strands of the circumstances adumbrated earlier in this judgment a reasonable tribunal properly directing itself on the law and the facts would have come to the conclusion that the totality of the evidence reasonably supported an irresistible *prima facie* inference that the respondents were found in possession of the proscribed drug. In other words they had *mens rea* possession of the drugs in question. We need not rehearse all the circumstances to which we have already referred in coming to this conclusion. Suffice to say that the close proximity, taken together with the evidence of flight and the possession of the motorcycle by the first respondent supports the inference that there was *mens rea* possession on his part. As for the second respondent, the learned judge acquitted him on the ground that there was lacking in the prosecution's case evidence of a common intention because there was nothing to show a prearranged plan as required by s. 34 of the Penal Code. However it is settled law that a prearranged plan is not synonymous with a premeditated crime: for, a prearranged plan may be formed instantaneously. See, *Mahbub Shah v. Emperor* AIR [1945] PC 118. As observed by Bose J in *Pandurang v. State of Hyderabad* AIR [1955] SC 216:

> The plan need not be elaborate, nor is a long interval of time required. It could arise and be formed suddenly …

These are matters which the learned judge, with respect, overlooked when dealing with the liability of the second respondent.

[11] But it must be said in fairness to the learned judge he did consider several items of evidence which in his view dispelled any conclusion of there been a common intention. We quote from his judgment:

> As for the common intention, this court finds that:
>
> (a) There is no evidence that both the accuseds came together to the place of crime either on the m/cycle, (exhibit P 6) or otherwise;
>
> (b) There is no evidence as to the relationship between the first and second accused;

A (c) There is no evidence both the accuseds knew each other before they were both found near the m/cycle, the first accused being seated on the m/cycle and the second accused standing beside the m/cycle;

B (cc) although both the accuseds were found at the scene, there was only one helmet found thereby indicating that there was only one person who came on the m/cycle and whose helmet it was had not been established.

C (d) there is insufficient evidence to draw any inference if there was any prearranged plan or even a plan that was reached on the spot;

(e) there is no evidence for how long both the accuseds were chatting or talking to each other prior to the time when PW3 saw them at the scene;

D (f) even if the evidence of PW3 is accepted as reliable that the first accused was seen meddling with something inside the carrier of the m/cycle where this court has found to be unreliable and not acceptable, it is still not safe and does not implicate the second accused who was standing beside the E m/cycle to such an extent to find that the second accused had knowledge that the black bag or the items inside the black bag which was found by PW3 on a search conducted inside the carrier of the m/cycle had contained dangerous drugs;

F **[12]** With respect to the learned judge the items of evidence he took into account as negativing common intention overlooked two critical pieces of evidence which linked the second respondent to the crime. First, his close proximity to the drug and his conduct in fleeing when the police identified themselves. These are strong G and cogent evidence which when thrown into the balance render the circumstances identified by the learned judge in the foregoing paragraph of little or no weight. Only the respondents can say what they were doing at the place in question. Only the first respondent as the person having control of the motorcycle can say H how it came to be where it was. And it is only he who can explain how the offending exhibit came to be in the carrier of the motorcycle. And it is only the respondents who can say why they were behaving in a suspicious manner as observed by the police witnesses. Unfortunately the learned judge did not adopt this I approach. Nor did he ask himself the questions that naturally arise from the totality of the evidence.

[13] For the reasons already given we are persuaded that this appeal has merit. In our judgment the learned judge ought to have called upon the respondents to make their defence to the charge framed against them. We accordingly allow the appeal. The orders of acquittal and discharge are set aside. The case is remitted to the High Court with the direction to the learned judge to call upon the respondents to make their defence to the charge. On application by the learned deputy the respondents shall be taken into custody and remanded until conclusion of the trial.

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